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No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1924

NASSAU SMELTING AND REFINING WORKS, LTD.,
PLAINTIFF IN ERROR

v.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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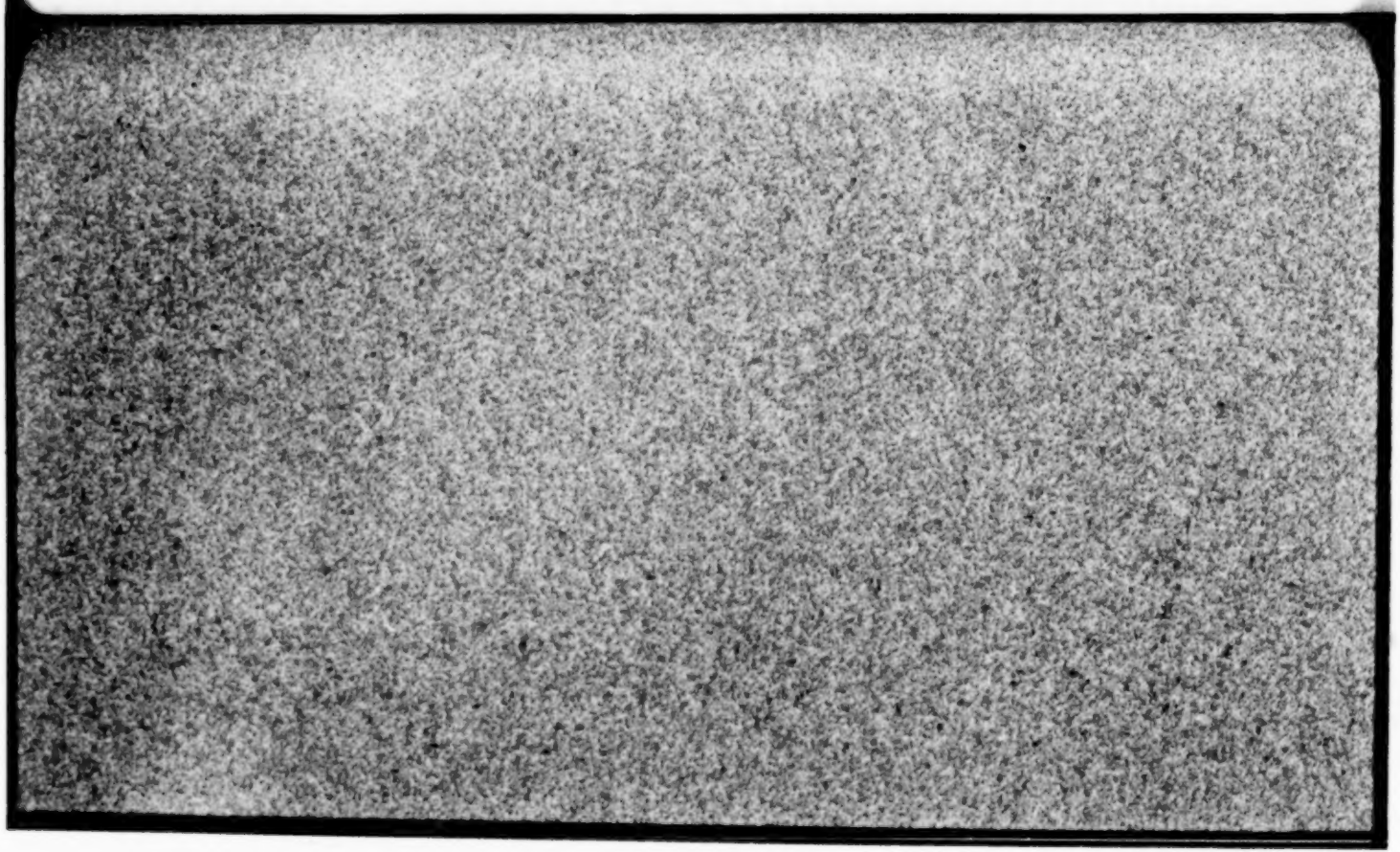

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STATEMENT

This writ of error brings up for review a judgment of the District Court of the United States for the Southern District of New York, dismissing three set-offs or counterclaims interposed by plaintiff in error, hereinafter called the Nassau Co., upon the ground that the court had no jurisdiction to entertain them. A certificate in conformity with Section 238 of the Judicial Code was made by Judge Mack, that the jurisdiction of the court of the subject matter of the set-offs or counterclaims was in issue, and was decided adversely to the plaintiff in error, and that by reason thereof, and not otherwise, the judgment of dismissal was entered, because—

> this Court is without jurisdiction to determine whether or not by reason of the facts set forth

by the defendant there is any credit, set-off, or counterclaim to be allowed to it as against its indebtedness to the United States. (Rec. 15.)

The specific question is whether the District Court, under the Act of Mar. 2, 1919, c. 94, 40 Stat. 1272 [1] (known as the Dent Act), has jurisdiction to entertain an action against the United States under agreements admitted to be within the purview of Section 1 of that Act.

[1] The Act, so far as it is pertinent to the case at bar, provides:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: *Provided*, That in no case shall any award, either by the Secretary of War or the Court of Claims, include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: * * *.

SEC. 2. That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company, or corporation referred to in Section 1 hereof to find and award fair and just compensation in the cases specified in said section in the event that such individual, firm, company, or corporation shall not be willing to accept the adjustment, payment, or compensation offered by the Secretary of War, as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment, or compensation, as provided for in said section.

The United States commenced an action against the Nassau Company in the District Court to recover sums due for merchandise sold and delivered to that company. The amended answer of the defendant below admitted all of the allegations of the government's complaint, and then affirmatively pleaded three separate and distinct set-offs or counterclaims thereto, each in an amount less than $10,000. They are alleged to be based upon agreements made during the late war and prior to November 12, 1918, with an officer acting under authority conferred upon him by the Secretary of War, for the manufacture of copper driving bands used in connection with the prosecution of the war. These set-offs or counterclaims are for balances alleged to be due under these agreements, and represent the difference between the amounts demanded by the Nassau Company and the amounts which had been paid by the United States. (Rec. 7, 8, 9, 10.) It is also alleged that the claims have been duly presented in accordance with the Act; that the Secretary has refused to make a satisfactory adjustment, and the prayer asks an award by the District Court, to be set-off against the amount demanded by the United States in its complaint, and, in the event that the total award exceeds the claim of the United States, it prays judgment against the United States for the excess. A motion was made by the government for judgment on the pleadings, and for an order dismissing the set-offs or counterclaims, which was granted and judgment

rendered in favor of the United States for the full amount of its claim. (Rec. 12, 13.)

The sole question involved here is whether the United States District Courts have concurrent jurisdiction with the Court of Claims under Section 24 (20) of the Judicial Code over the claims specified in Section 1 of the Dent Act not exceeding $10,000 each, or whether Section 2 of the latter Act confers exclusive jurisdiction upon the Court of Claims irrespective of the amount involved. No other question is raised or discussed in the brief of the plaintiff in error.

ARGUMENT

The Court of Claims has exclusive jurisdiction of claims arising under the Dent Act

To support its contention, the plaintiff in error discusses at length the case of *United States* v. *Pfitsch*, 256 U. S. 547. We think that case supports our contention. That action was brought under Section 10 of the Lever Act (Act of August 10, 1917, c. 53, 40 Stat. 276, 279), which by its terms conferred jurisdiction on the District Courts. The only question in this Court was whether in hearing such cases the District Court exercised its ordinary jurisdiction, or whether the jurisdiction was that exercised in the manner provided by Section 24 (20) of the Judicial Code, concurrently with the Court of Claims. In holding that the jurisdiction exclusively granted by the Lever Act was to be exercised according to the

usual procedure of the District Court, this Court made a complete survey of the war legislation conferring jurisdiction upon courts to hear suits against the United States. In this connection Mr. Justice Brandeis, at page 553, said:

> In seventeen instances it (Congress) definitely provided, by reference to the appropriate sections of the Judicial Code, for concurrent jurisdiction in the Court of Claims and the District Courts, sitting as a Court of Claims. In the four instances above set forth it conferred jurisdiction only on the District Courts. In four instances it conferred jurisdiction only on the Court of Claims.

The Dent Act is cited as one of the four instances in which jurisdiction had been conferred *only* on the Court of Claims.

Continuing, Mr. Justice Brandeis said:

> The established rule of statutory construction should lead us to give effect in every practical manner to the distinctions which Congress has seen fit to make.

This Court has, therefore, expressly recognized in the *Pfitsch* case that the Court of Claims under Section 2 of the Dent Act is the only Court that has jurisdiction of claims within that Act. Had Congress intended otherwise it would undoubtedly have referred to Section 24 (20) of the Judicial Code, as it has done in the other Acts cited in the *Pfitsch* case at page 553, or would have used plain language to convey such an intent.

The fact that Congress in some instances has conferred concurrent jurisdiction on the District Courts over claims against the United States does not indicate that it intended to do so in all cases, even though it may not be apparent why Congress should make distinctions. *Thornley* v. *United States*, 113 U. S. 310, 315.

The United States can be sued for such causes and in such courts *only* as it has by act of Congress permitted. *United States* v. *Gleeson*, 124 U. S. 255, 258 And where it has specified a special remedy, as in Section 2 of the Dent Act, that remedy is exclusive, *United States* v. *Babcock*, 250 U. S. 328, 331, and it will not be enlarged by implication. *Price* v. *United States*, 174 U. S. 373, 375. It is no answer to say that if the plain terms of the Dent Act are followed it may result in inconvenience to the litigant in the prosecution of his claim against the government, for this will not justify a departure from the express terms of the Act. *American Railroad Co.* v. *Birch*, 224 U. S. 547, 557; *United States* v. *Rider*, 163 U. S. 132, 140; *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, 93.

The Dent Act having provided a specific remedy for a class of cases of an unusual character, in which but for the Act no redress could have been obtained, the jurisdiction to try such cases should be confined to that Court which by the terms of the Act was exclusively empowered to try them.

CONCLUSION

The judgment of the Court below should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

SEPTEMBER, 1924.

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